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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE POTOMAC ELECTRIC POWER COMPANY,
Petitioner,

v.

STEPHEN H. SACHS,
ATTORNEY GENERAL OF MARYLAND, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the Court below apply correctly the doctrine of Younger v. Harris, 401 U.S. 37 (1971), when it held that abstention was required because a pending state grand jury investigation of the plaintiff is a state judicial proceeding to which the federal courts must defer?

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BRIEF IN OPPOSITION TO
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COUNTER-STATEMENT OF THE CASE

As the district court found, "PEPCO [Potomac Electric Power Company] brought this suit in federal court in an apparent attempt to foreclose the possibility of a state criminal prosecution." 639 F.Supp. 856, 858

(D.Md. 1986) (App. at 34a).[1] The state grand jury was seeking to determine whether PEPCO had violated Maryland's criminal hazardous waste disposal laws.

Between 1981 and 1983, PEPCO sold scrap electrical transformers to the United Rigging and Hauling Company ("United Rigging") of Beltsville, Maryland. Some of the transformers contained oil contaminated with polychlorinated biphenyls ("PCBs").[2] In April, 1985, the Attorney General of Maryland started a state grand jury criminal investigation of PEPCO's and United Rigging's PCB-disposal

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[1] Citations in the form "App. at ___" are to the appendix to PEPCO's petition for certiorari.

[2] PCBs are "a highly toxic carcinogen." Midlantic National Bank v. New Jersey Dept. of Environmental Protection, ___ U.S. ___, 106 S.Ct. 755, 757 (1986).

actions.[3] That investigation included a court-authorized search of United Rigging's site, chemical tests of oil in transformers identified as among those purchased from PEPCO that showed high PCB concentrations, and grand jury subpoenas to PEPCO for documents and to its employees for testimony.

PEPCO tried to stop the State's criminal investigation by filing this federal declaratory judgment action. PEPCO's complaint alleged that Maryland's criminal hazardous waste disposal laws are preempted by the federal Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§2601, et seq. The State moved to dismiss PEPCO's complaint on the ground, among others, that the State's then-pending state grand jury investigation of

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[3] While this case was pending in the Fourth Circuit, United Rigging pleaded guilty to violating Maryland's water pollution law, Md. Health Envir. Code Ann. §9-322. See 802 F.2d 1527, 1529 n.5 (4th Cir. 1986) (App. at 13a n.5).

PEPCO was a state judicial proceeding to which the federal court was required to abstain under the doctrine of Younger v. Harris, 401 U.S. 37 (1971). The district court denied that motion (App. at 26a - 30a), notwithstanding its finding that "[t]here is little question from the record . . . that an indictment of PEPCO for alleged responsibility for or participation in the United Rigging contamination is imminent." 638 F.Supp. at 857 (App. at 34a).

On the merits, however, the district court rejected PEPCO's argument that Maryland's hazardous waste disposal laws are preempted by TSCA. 639 F.Supp. 856 (App. at 31a). PEPCO appealed that decision, and the State cross-appealed the denial of its motion to dismiss. On appeal, the Fourth Circuit reversed the district court's Younger decision, holding that abstention was required because a state grand jury proceeding is a

judicial proceeding to which the federal courts must defer. 802 F.2d 1527 (App. at 1a). PEPCO's petition to this Court followed.

On December 9, 1986, subsequent to the filing of PEPCO's petition in this Court, PEPCO's counsel was advised by the Assistant Attorney General conducting the State's criminal investigation that the State had decided to suspend its investigation because of a pending federal investigation into the same matters. See Appendix to PEPCO's Supplemental Brief.

REASONS FOR DENYING THE WRIT

Summary

The Fourth Circuit applied correctly this Court's long line of Younger decisions. There is no merit to PEPCO's argument that Maryland grand jury proceedings are not state judicial proceedings involving important state interests. This Court has made it

emphatically clear that absent extraordinary circumstances federal courts must abstain when the federal plaintiff is involved in ongoing state judicial proceedings.

Abstention is particularly necessary when the federal plaintiff is the subject of a state grand jury investigation. Failure to abstain in such a case would result in substantial federal judicial interference in state criminal investigatory and prosecutorial functions and would be inconsistent with Younger's core principles of comity and federalism.

The suspension of the State's investigation of PEPCO makes the issue raised in the petition for certiorari moot. This case should not, however, be remanded to the Fourth Circuit, as PEPCO requests in its Supplemental Brief, because the Younger issue was decided correctly by the Fourth Circuit as PEPCO was under investigation by a state

grand jury when this action was filed and while the case was pending in the district and lower appellate courts. Contrary to PEPCO's arguments, Younger abstention is required if the federal plaintiff is the subject of state judicial proceedings when the case is first heard in the district court. Because PEPCO was then under investigation by a state grand jury, abstention was mandated, this case should have been dismissed then, and there is no basis for any further proceedings.

I. This case involves no novel issues on which the lower courts require the guidance of this Court.

A. The Fourth Circuit's decision is in accordance with this Court's long line of Younger abstention decisions.

Younger v. Harris, 401 U.S. 37 (1971), and its progeny require federal courts to abstain from enjoining, or issuing a declara-

tory judgment, with respect to a state judicial proceeding, even if pursued under a possibly unconstitutional statute, provided three conditions are satisfied: (1) there are ongoing state judicial proceedings; (2) the ongoing state judicial proceedings implicate an important state interest; and (3) there is an adequate opportunity in the ongoing state proceedings to raise constitutional challenges. See Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 432 (1982). Abstention was mandated in this case because these three conditions existed when this case was heard and decided in the district court.

This Court has long recognized that grand jury proceedings are judicial proceedings. See, e.g., Ex Parte Young, 209 U.S. 123, 163 (1908) (describing the grand jury as "part of the machinery of a criminal court"); Cobbledick v. United States, 309 U.S. 323,

327 (1940) ("The Constitution itself makes the grand jury a part of the judicial process."); Levine v. United States, 362 U.S. 610, 617 (1960) (grand jury proceedings constitute a judicial inquiry). This point is equally clear under Maryland law. See, e.g., Duckett v. Touhey, 36 Md.App. 238, 242, 373 A.2d 323, 325 (1977).

The State has an obviously important, indeed paramount, interest in preserving the independence and integrity of its grand jury proceedings. That interest includes unfettered authority to investigate those whom prosecutorial authorities believe to have violated the State's criminal laws. Federal judicial interference in this area of critical state concern is, as the Fourth Circuit correctly recognized, flatly inconsistent with Younger's fundamental principles of comity and federalism. See 802 F.2d at 1530-31.

The third prong of Younger - an adequate state opportunity to raise constitutional challenges - was also satisfied here. PEPCO has never claimed that Maryland's courts are incapable of deciding its federal preemption claim, if it were indicted.[4] Rather, PEPCO's sole complaint involves when it is afforded the opportunity to present its federal claims. See Petition, e.g., at 16 ("PEPCO, however, will only have an opportunity to raise its claims 'if indicted.'") (citation omitted). This Court, however, has rejected repeatedly the argument that Younger is inapplicable because the opportunity to present federal claims is provided later rather than sooner. See Moore v. Sims, 442 U.S. 415 (1979); Middlesex County Ethics Comm. v.

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[4] Were PEPCO to make such a claim, it is clear that it would be without merit. This Court has emphatically rejected the assertion that state courts are somehow less competent than federal courts to decide federal issues. See Moore v. Sims, 442 U.S. 415, 430 (1979).

Garden State Bar Ass'n, 457 U.S. 423 (1982); Ohio Civil Rights Comm. v. Dayton Christian Schools, Inc., ___ U.S. ___, 106 S.Ct. 2718 (1986).

The fallacy of PEPCO's argument is shown perhaps most clearly by this Court's reversal of the Third Circuit in Middlesex. The Third Circuit's rationale for not abstaining was that "the state proceedings have not yet reached a stage at which [plaintiff] Hinds' constitutional claims may be adjudicated. . . ." Garden State Bar Ass'n v. Middlesex County Ethics Comm., 643 F.2d 119, 130 (1980). As this Court held, however, abstention was required in Middlesex because state law did not bar the interposition of the federal plaintiff's constitutional claims. Notwithstanding the federal plaintiff's dissatisfaction with when the opportunity to raise federal claims was provided, abstention was required because state

law clearly provided the opportunity to raise federal claims at some point. The same is true in this case.

An equally direct rejection of PEPCO's timing (or instant gratification) theory of abstention is the decision last Term in Ohio Civil Rights Commission. There, the Court held that Younger abstention was required even if federal claims could not be raised before the administrative agency because "constitutional claims may be raised in state court judicial review of the administrative proceeding." 106 S.Ct. at 2724.[5]

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[5] Because this judicial review would occur in proceedings altogether separate from and clearly subsequent to the administrative proceedings, PEPCO is just plain wrong when it asserts that "[t]his Court . . . has never required abstention when the plaintiff had no present opportunity to raise his federal claims in pending state adjudicatory proceedings." Petition at 15 (emphasis in original).

Samuels v. Mackell, 401 U.S. 66 (1971), fully answers PEPCO's alternative argument that the Younger abstention doctrine is inapplicable to preemption claims. Notwithstanding the plaintiff's claim there that a New York statute was preempted, 401 U.S. at 67, abstention was required. In addition, this alternative argument is altogether illogical.

A supremacy clause claim is not entitled to a lower abstention standard than is a preferred First Amendment claim, for example. This Court has, of course, held that abstention may be required even when the plaintiff claims that the challenged state action violates First Amendment rights. See, e.g., Younger v. Harris; Ohio Civil Rights Comm. v. Dayton Christian Schools, Inc. Therefore, a plaintiff, like PEPCO, who relies upon a federal statute and the supremacy clause as the bases for challenging a state's actions

should not be more favored than a First Amendment plaintiff, particularly when this Court has held that a supremacy clause-derived preemption claim is not a constitutional claim. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979).

The suspension of the State's investigation illustrates graphically both the soundness of the Younger doctrine in general and the applicability of the doctrine to this case. The State's criminal investigation, including grand jury proceedings, went forward without federal interference. The conclusion of this state proceeding has been a decision to suspend the investigation. Thus, the State's thoroughly legitimate interest in unfettered prosecutorial authority has been preserved and the matter has come to an end without the necessity for any court, and most especially a federal court, to get involved.

B. The Fourth Circuit's decision is in accord with the vast majority of appellate and district court decisions on this issue.

PEPCO makes much of the conflict between the Fourth Circuit's decision in this case and the Third Circuit's decision in Monaghan v. Deakins, 798 F.2d 632 (1986), petition for certiorari pending No. 86-890. That argument obscures the plain fact that Monaghan is truly an anomaly which is flatly inconsistent with the clear holdings of this Court, see 7 - 14, supra,[6] and with a body of lower court decisions holding that a state grand jury proceeding constitutes a state judicial

[6] The flaw in the Third Circuit's analysis in Monaghan is the same as that in its earlier decision in Middlesex. In both cases, the Third Circuit held Younger inapplicable because of when state law provided an opportunity to raise federal claims. That is the wrong inquiry. As this Court's decisions make plain, the proper inquiry is whether state law provides such an opportunity, not when. See, e.g., Moore v. Sims, 442 U.S. at 425.

proceeding for Younger purposes. See Craig v. Barney, 678 F.2d 1200, 1202 (4th Cir.), cert. denied, 459 U.S. 860 (1982); Kaylor v. Fields, 661 F.2d 1177, 1181 (8th Cir. 1981); Law Firm of Daniel P. Foster v. Dearie, 613 F.Supp. 278, 280 (E.D.N.Y. 1985); Sovereign News v. Falke, 448 F.Supp. 306, 347-359 (N.D.Ohio 1977), remanded on other grounds, 610 F.2d 428 (6th Cir. 1979); Notey v. Hynes, 418 F.Supp. 1320, 1326 (E.D.N.Y. 1976).

Because the Fourth Circuit's decision in this case is completely consistent with the decisions of this Court, as well as a well-developed body of lower court decisions, further review is unwarranted.

II. PEPCO's declaratory judgment complaint in which it sought a determination of the validity of a federal defense to a state indictment did not state a claim "arising under the Constitution, laws, or treaties of the United States."

This case is an inappropriate vehicle to decide the Younger issue for the additional

reason that PEPCO's declaratory judgment complaint failed to state a "federal question" within the meaning of 28 U.S.C. §1331.[7] This Court has never held that the Declaratory Judgment Act, 28 U.S.C. §§2201-2202, authorizes the federal courts to determine the validity of a federal defense to a state charge. This Court has held repeatedly, however, that federal question jurisdiction does not exist where the complaint anticipates a defense based on federal law to a threatened state action. See Gully v. First National

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[7] The State moved to dismiss PEPCO's complaint based upon lack of jurisdiction as well as Younger abstention. The district court denied both motions (App. at 20a - 30a), but then rejected PEPCO's preemption claim and ruled for the State on the merits. 639 F.Supp. 856 (App. at 31a). PEPCO appealed this decision, and the State cross-appealed the district court's denial of its motion to dismiss based upon lack of jurisdiction and Younger abstention. The Fourth Circuit rejected the State's jurisdictional argument, 802 F.2d at 1529, n.3 (App. at 12a, n. 3), but agreed that abstention was mandated. 802 F.2d 1527 (App. at 1a).

Bank in Meridian, 299 U.S. 109, 116-18 (1936); Louisville v. Nashville Railroad Co. v. Mottley, 211 U.S. 149, 152-54 (1908).

Here, because "the character of the threatened action", see Public Service Comm'n of Utah v. Wycoff, 344 U.S. 237, 248 (1952), is an indictment for violating state law, this suit does not "arise under" federal law as required by 28 U.S.C. §1331. Rather, federal law enters this case only because PEPCO filed this declaratory judgment suit as a defensive action, thereby hoping to defeat prosecution under state law.[8]

The concurring opinion of now-Chief

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[8] This Court has "consistently emphasized that, in exploring the outer reaches of §1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." Merrell Dow Pharmaceuticals, Inc. v. Thompson, ___ U.S. ___, 106 S.Ct. 3229, 3233 (1986). Holding that jurisdiction exists here expands federal judicial power at the expense of the State's ability to conduct criminal investigations.

Justice Rehnquist in Steffel v. Thompson, 415 U.S. 452 (1974), makes clear that the lower courts' jurisdictional holdings are incompatible with the history and purpose of the Declaratory Judgment Act:

> First, the legislative history of the Declaratory Judgment Act and the Court's opinion in this case both recognized that the declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity. There is nothing in the Act's history to suggest that congress intended to provide persons wishing to violate state laws with a federal shield behind which they could carry on their contemplated conduct. Thus, I do not believe that a federal plaintiff in a declaratory judgment action can avoid, by the mere filing of a complaint, the principles so firmly expressed in Samuels [v. Mackell, 401 U.S. 66 (1971)], supra. The plaintiff who continues to violate a state statute after the filing of his federal complaint does so both at the risk of state prosecution and at the risk of dismissal of his federal lawsuit. For any arrest prior to resolution of the federal action would constitute a pending prosecution and bar declaratory relief under the principles of Samuels.

415 U.S. at 479-80 (emphasis added).

Because the Declaratory Judgment Act does not "provide persons wishing to violate state laws with a federal shield behind which they could carry on their contemplated conduct" (emphasis added), the Act certainly should not be interpreted to provide persons who are under grand jury investigation for having violated state criminal laws in the past with a federal shield to avoid state prosecution.

Federal question jurisdiction was not intended to assist those who seek to prevent state authorities from determining whether the state's criminal laws have been violated. Simply stated, clever federal declaratory judgment pleading should not be permitted to convert what is plainly a state matter into a federal case.[9]

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[9] In People of the State of Illinois v. Archer Daniels Midland Co., 704 F.2d 935 (7th Cir. 1983), Judge Posner analyzed closely the jurisdictional issue presented here and (cont'd)

III. The issue presented by PEPCO's petition is moot because the State has suspended its criminal investigation.

Review should not be granted in this case because the only issue presented by the petition is rendered moot by the fact that the State has suspended its criminal investigation. Indeed, PEPCO's Supplemental Brief is largely devoted to conceding that the issue raised in its petition is moot. Thus, this case is not an appropriate one for the Court to decide the applicability of Younger to state grand jury proceedings.

Having conceded that its petition for certiorari is moot, PEPCO nevertheless claims

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reached the opposite conclusion as that reached by the Fourth Circuit. The State's Attorney in Archer Daniels Midland filed a state declaratory judgment action seeking a determination of whether the Illinois Strike-breakers Act was preempted by federal law. The Archer Daniels Midland Company removed the case to federal court, claiming, as PEPCO did, that the state law was preempted. 704 F.2d at 938. The Seventh Circuit held that the district court lacked jurisdiction. Id. at 943.

that its case is not. For two reasons, this is incorrect and the proper disposition of this case is denial of certiorari, not remand to the Fourth Circuit. First, absent the threat of indictment, there would not have been a case or controversy. Now that that threat has been removed, there is no case or controversy. And second, this Court has made it clear that the applicability of Younger is to be determined when the case is heard in the district court.

PEPCO filed this action for one reason and one reason only: because of the threat of indictment. While PEPCO seeks to obscure that point now, the truth was clear to both the Fourth Circuit and the district court. See, e.g., 802 F.2d at 1529, n. 5 (App. at 13a, n. 5) (quoting district court's conclusion that "an indictment of PEPCO for alleged responsibility for or participation in the United Rigging contamination is imminent."),

and 639 F.Supp. at 858 (App. at 34a) ("PEPCO brought this suit in federal court in an apparent attempt to foreclose the possibility of a state criminal prosecution."). PEPCO has never disputed these findings regarding its reason for filing this case.[10]

Now that the jurisdictional predicate for this declaratory judgment action has been removed, there is no case or controversy. This is not, therefore, a traditional mootness on appeal case in which the proper disposition is remand for further proceedings on outstanding issues, see, e.g., University of Texas v. Camenisch, 451 U.S. 390 (1981), because here the threat of indictment gave

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[10] Indeed, rather than disputing the fact that it was the threat of indictment that caused it to file and pursue this case very aggressively, PEPCO sought extraordinary expedition in the Fourth Circuit on the ground that "it is likely that PEPCO will be charged in an indictment before this Court resolves the appeal." See PEPCO's Motion to Expedite ¶5.

rise to the filing of the suit and the Younger issue raised in the petition. Absent that threat, there is no Article III case or controversy. In truth, PEPCO is asking this Court to amend its complaint by speculating about a case it did not bring,[11] and which would not have been justiciable in any event. Without the threat of indictment, the case would have lacked and now does lack the jurisdictionally required degree of concrete controversy. See Toilet Goods Association v. Gardner, 387 U.S. 158, 162-66 (1967); Babbitt v. United Farm Workers National Union, 442 U.S. 289, 298-99 (1979).

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[11] PEPCO strains in its Supplemental Brief to claim that "[a] live controversy continues to exist between the parties with respect to the preemption issue." Id. at 3. PEPCO cannot explain, however, and thus does not attempt to explain, (1) why it never challenged Maryland's PCB disposal laws until it was under investigation by a state grand jury, and (2) what enforcement action, if any, Maryland has taken, will take, or contemplates taking other than the now-suspended grand jury proceeding.

Furthermore, this Court has made it clear that the applicability of Younger is determined as of when proceedings of substance occur in the district court, and not, as PEPCO suggests, based on the status of the state proceedings when the case finally reaches this Court. See Younger v. Harris, 401 U.S. at 41; Perez v. Ledesma, 401 U.S. 82, 85 n.2 (1971); Hicks v. Miranda, 422 U.S. 332, 349 (1975). The Sixth Circuit recently applied this reasoning in Zalman v. Armstrong, 802 F.2d 199, 203 (1986):

> In our view, the principles underlying Younger require that the initial frame of reference for abstention purposes be determined at the time that the federal complaint is filed, or at the very latest, at the time a hearing is held on the merits in federal court. Any other rule would, in many cases, permit a district court to directly interfere in an ongoing state proceeding and yet preclude a review of the propriety of that interference by an appellate court.

The Younger issue presented by the petition was decided correctly by the Fourth Circuit. That issue, however, is now moot, but without the threat of indictment, there is no case or controversy. Further proceedings are inappropriate.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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